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IN THE

Supreme Court of the United States

October Term, 1957.

No. 557.

RAILWAY EXPRESS AGENCY, INCORPORATED,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

and

UNITED PARCEL SERVICE, INC.,
Intervening Defendant-Appellee.

On Appeal From the United States District Court for the Southern District of New York.

MOTION TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervening-Defendant-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from the final judgment of a district court of three judges constituted pursuant to 28 U. S. C. §§ 2284, 2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to Intervening-Appellee, United Parcel Service, Inc., (herein "United Parcel").

The history of this proceeding begins with the application of United Parcel to the Interstate Commerce Commission for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, over described irregular routes between Chicago, Illinois and certain points in Iowa, Illinois, Indiana, Wisconsin, and Michigan. After extensive hearings, at which 50 witnesses testified and 90 exhibits were received, the Examiner recommended that a certificate be granted. Division 1, in a comprehensive opinion, unanimously adopted the Examiner's recommendations and ordered the issuance of the certificate. In its report, Division 1 made the following requisite findings (J. St. A-41):

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, from and to the points, and subject to the restrictions described in the appendix hereto.
>
> "We further find that the holding by applicant at the same time of the certificate authorized to be issued herein and of the permit heretofore issued to it will be consistent with the public interest and the national transportation policy.
>
> "We further find that applicant is fit, willing, and able, properly to perform such service and to conform

to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder; * * *"

Accordingly, the Division ordered the issuance of a certificate of public convenience and necessity to United Parcel.

Appellant thereupon filed a petition with the full Commission seeking reconsideration of the decision of Division 1. The entire Commission, upon consideration of the record, and good cause appearing, unanimously entered an order on January 23, 1957 that appellant's petition be denied for the reasons that "(1) the record adequately supports the findings of Division 1, and (2) no sufficient cause appears for reopening the proceeding for reconsideration or for oral argument." (J. St. A-44.)

Thereafter, United Parcel filed a tariff to become effective April 1, 1957. Appellant filed a request for the suspension of the tariff. The Commission refused to suspend, and the tariff went into effect by its terms on April 1, 1957. Appellant did not file any complaint against United Parcel's rates pursuant to Section 216(e) of the Interstate Commerce Act, 49 U. S. C. § 316(e).

On March 28, 1957, appellant commenced the present action in the United States District Court for the Southern District of New York, seeking the annulment of the Commission's order granting the certificate of public convenience and necessity. In its action appellant did not attack the ultimate findings of convenience and necessity and that applicant is fit, willing and able to properly perform the proposed service. Nor did appellant attack the subsidiary findings upon which the ultimate findings were based.[1] Rather, appellant challenged the United Parcel

1. Examples of specific findings by the Examiner, *none of which is here challenged* by appellant, are:

—that there is an "urgent need on the part of the shipping public for a small-package service such as that proposed" by Intervenor (J. St. A-25);

—that among the attractive features of the system are such factors as: "(1) scheduled daily pickups are made at the premises of the consignor, (2)

tariff, the validity of which the Commission had not passed upon in the certificate proceeding. Specifically, appellant's attack was leveled at the legality of one aspect of United Parcel's proposed tariff, the $2.00 weekly service charge contained in United Parcel's proposed rate schedule.

This charge is for a service whereby a United Parcel pickup driver calls automatically each day at a regularly scheduled time at the place of business of each subscribing shipper without regard to the size of his business or the volume or number of packages shipped.

The court below dismissed the complaint holding appellant had failed to exhaust the administrative remedy provided by the Interstate Commerce Act for challenging the legality of tariff provisions. The court also rejected appellant's contention that the Commission based its findings on evidence predicated on United Parcel's specific tariff, holding that the findings were based on evidence showing that United Parcel was fit, able and willing to meet the needs of shippers for the service proposed by United Parcel.

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dependable next-day delivery is made in the entire area served, (3) written proof of delivery is obtained in all instances from the consignee (4) facilities are provided for the prompt tracing of shipments, even in response to telephone calls, (5) prompt settlement of loss and damage claims is made without burdensome 'red tape' and delays, (6) personal checks are accepted in payment of C. O. D. charges, (7) when initial delivery cannot be made, subsequent deliveries are attempted, and refused or undeliverable shipments are returned to the consignor without additional cost, and (8) free insurance is provided within certain limits" (J. St. A-18);

—that "there is nothing of record to indicate that the opposing motor common carriers are willing or able to provide the service shown to be required" (J. St. A-25) and

—that "there is no convincing evidence that the institution of the proposed service will result in any great diversion of traffic from the [Railway] express company or will materially affect its overall operations" (J. St. A-25).

ARGUMENT.

The decision of the court below is clearly correct under the provisions of the Interstate Commerce Act, the governing case law and long established administrative practice.

In this appeal appellant seeks to set aside the grant of a certificate of public convenience and necessity. But appellant's attack is not directed to the findings which form the basis of the Commission's grant of the certificate. Rather, appellant has chosen to attack a provision of United Parcel's tariff filed after the certificate proceeding had ended.

Appellant's basic contention is that the $2.00 service charge contained in United Parcel's tariff is unlawful and that United Parcel "should not have been certificated in the absence of a finding after a full hearing that the tariff device was lawful." (J. St. A-13.)

This contention totally ignores the provisions of Section 216(e) of the Interstate Commerce Act (49 U. S. C. § 316(e)) which precisely prescribes the procedure for challenging the legality of a tariff. Section 216(e) provides:

> "Any person • • • may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. • • •"

That procedure appellant has not followed. The Examiner and the Commission, following long established practice,[2] held that appellant's challenge to the service charge was premature and refused to pass on the validity of the tariff provision in the course of the certificate proceeding.

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2. See, e.g. OMAHA & C. B. RY. & BRIDGE CO. Common Carrier App., 52 M. C. C. 207 235 (1950); WELLSPEAK, COMMON CARRIER APPLICATION, 1 M. C. C. 712 (1937).

The court below properly held that the Commission's action in this respect was correct. Judge Swan pointed out that the granting of the certificate has not "deprived Railway Express Agency of opportunity to challenge the legality of United Parcel's rate schedule" pursuant to the above section. "Until this administrative remedy has been exhausted, complaint to the courts is premature." (J. St. A-5.) Accordingly, the legality of United Parcel's tariff is not a ground upon which appellants can base an argument against the grant of a certificate of convenience and necessity. *American Trucking Associations v. United States*, 326 U. S. 77, 86 (1945).

For the first time, appellant now contends that, absent the United Parcel tariff provision, United Parcel failed to prove its ability to operate the service proposed. Of course, this contention is merely another attempt to circumvent the statutorily prescribed method for challenging the tariff. Moreover, the contention is founded on the erroneous assumption that the Commission based its findings on this specific aspect of plaintiff's rates. The fact, however, is otherwise.

As Judge Swan stated (J. St. A-6):

> "* * * the Commission did not base its finding of convenience and necessity on the specific rate structure proposed by the applicant. On the contrary it found that neither plaintiff nor other carriers were meeting, or were fit, able and willing to meet, the shippers' needs for the particular service proposed by the applicant, and it expressly rejected the protestants' argument that the public witnesses favored the application out of a desire for lower rates. * * * We think it apparent from the reports of the examiner and Division I that the certificate was granted to United Parcel on the basis of evidence showing a more

efficient service, at a lower cost and of a type not presently offered to shippers."[3]

With regard to United Parcel's ability to perform the proposed service, appellant has wholly ignored the detailed basis for the Commission's finding of ability set forth in the subsidiary findings of the Examiner. (J. St. A-16, A-17, A-19, A-39, A-40).[4] Thus, for example, the Examiner found that United Parcel has "developed an elaborate system for handling of small parcels which has proved both efficient and economical" (J. St. A-19); that based upon its past experience United Parcel would have "no difficulty in meeting the volume requirement" of the proposed service (J. St. A-19); and that at the time of the hearing, the identical operation in the Chicago area "was making daily pickups from 1,300 consignors and handling approximately 15,000 packages a day" (J. St. A-19). The Examiner also set forth in detail the financial assets of United Parcel and the nature and extent of equipment which was to be utilized in the proposed service (J. St. A-16, A-17). None of those findings has been or could be challenged by appellant.

Appellant not only has ignored the findings on which the grant of the certificate was based, but has also made the unwarranted assumption throughout its statement of jurisdiction that the exact tariff to which it objects is "essential" to the United Parcel service. That assumption finds no support in the record, as was pointed out by the

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3. The significance of securing the benefits of improved transportation was succinctly summed up by Mr. Justice Reed in *Interstate Commerce Commission v. Parker*, 326 U. S. 66, 67-70 (1944), as follows: "* * * Public convenience and necessity should be interpreted so as to secure for the Nation the broad aims of the Interstate Commerce Act of 1940. * * * [Since] on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers * * *, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue. *The public is entitled to the benefits of improved transportation* * * *." (Emphasis supplied.)

4. The Commission adopted the facts stated by the Examiner (J. St. A-34) and his report must therefore be considered together with the Commission's report.

Commission and by the court below. If for any reason United Parcel's tariff presently on file is properly challenged and found not feasible, a practical alternative can and will be available.[5] As stated by Division I of the Commission and quoted in part by the court below (J. St. A-4, A-38, A-39):

> "If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply with such rules and regulations and to consult with our staff in preparing its initial tariff. * * *"

Thus, no considerations of law or practicality call for any departure in this case from the Commission's long standing and uniform practice of passing on the validity of rates only by the statutory procedure established there for. The Commission and the court below in refusing to depart from such practice acted under clear and established principles.

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5. Judge Murphy, dissenting, briefly summarized certain financial data as to United Parcel's intrastate operations and apparently concluded that if the service charge objected to were eliminated, the operation would not be economically feasible. The error of this analysis is obvious. If this service charge were abandoned, a different rate structure would be substituted, calculated to produce not less than the revenue realized under the present tariff. And no contention has been, or properly could be, made that the amount of revenue which would be realized under the present tariff would be inadequate to assure profitable operations under which United Parcel could meet the need which the Commission has found is not being met by appellant or by any other carriers.

CONCLUSION.

We respectfully submit therefore that the appellant has not presented any substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

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